LIM SEW

v.

CHIN WHYE THIAM

HIGH COURT MALAYA, MUAR
PUAN RAHMAH BTE HUSSAIN J
[SUIT NO. 22-21 OF 1990]
24 JANUARY 1995

***LAND LAW**: Claim for possession of land from defendant - Plaintiff registered proprietor under Land (Group Settlement Areas) Act 1960 - Plaintiff unaware of successful application for title until notice issued by Land Office in 1988 - Land purportedly sold by plaintiff in 1965 - Purchaser selling land to 3rd party - Defendant claiming land sold to defendant by 3rd party in 1977 vide sale agreement and power of attorney - Defendant counterclaiming for specific performance or damages - Whether plaintiff deaf mute and illiterate - Plea of non est factum - Whether applicable - Whether plaintiff acquiring any rights to title prior to 1988 - Sections 12(1) & 15(2) of the Act 1960 - Whether sale valid - Whether defendant bona fide purchaser for value without notice - Title containing restrictions - Whether restrictions circumvented by sale agreement and power of attorney.*

***EVIDENCE**: Plaintiff claiming for possession of land - Defendant acquiring land from 3rd party - Defendant relying on sale agreements and powers of attorney executed by 3rd party to substantiate right to land - Makers not called to prove documents - Whether admissible - Plaintiff not giving evidence and not calling sub-purchasers as witnesses - Whether fatal - Whether plaintiff's case proved.*

This was a claim for recovery of possession by the plaintiff, a deaf mute, who was the registered proprietor of land known as HS(M) Lot 2344 Mukim of Nyior, Kluang (the said land) from the defendant who counterclaimed for specific performance or damages pursuant to a sale and purchase agreement and power of attorney.

The defendant alleged that the plaintiff by a sale and purchase agreement and power of attorney had sold the said land to two persons (Ong and Tay) on 25 April 1965 who by an agreement of sale and deed of substitution under power of attorney had sold the said land to another (Chin) on 18 October 1970 and who in turn sold the said land to the defendant on 23 January 1977. The defendant sought to introduce the two documents to support his argument.

The said land was subject to the Land (Group Settlement Areas) Act 1960 (the Act) and as such the plaintiff was authorised to occupy the said land in expectation of title. The plaintiff only became aware of her successful application for title to the said land on 28 May 1988 when she received notice from the Land Office, which was sent to the defendant's address, and the purported sub-purchasers were not able to collect the title deeds from the Land Office. The plaintiff was issued with the issue document of title (IDT) which contained restrictions against, *inter alia*; sale without the consent of the State Authority. The plaintiff, who was illiterate pleaded *non est factum* and did not give formal evidence in Court due to her handicap.

Counsel for the plaintiff submitted that the sale documents and powers of attorney were inadmissable as the makers had not been called to prove the contents. Counsel for the defendant submitted that the fact that the plaintiff did not give evidence and failed to call Ong and Tay as witnesses was fatal to the plaintiff's claim.

The main issues to be decided were whether the sale to the defendant was valid and whether the defendant was a *bona fide* purchaser for value without notice that the said land was subject to the Act.

Held:

[1] Since the defendant was not a party to the said documents and since by his own admission he had no knowledge at all about them, the two documents are inadmissible and cannot be relied on by the defendant. Furthermore, the plaintiff's plea of *non est factum* applies in this case as the plaintiff is a deaf mute and an illiterate person as well. There was no evidence adduced by the defendant that the two documents were read over and explained to the plaintiff.

[2] Since the holding was at all material times prior to 24 May 1988 State land, the plaintiff had no land to sell to Ong and Tay. Furthermore, under s. 15(2) of the Act, no land comprised in a rural holding may be held by way of undivided shares. Similarly, when Chin bought the holding on 18 October 1970 from Tay, the said land was still under the name of the plaintiff in the Register of Holdings. Therefore the defendant cannot claim as a *bona fide* purchaser for value without notice as well, as he had admitted in cross-examination that he and his family knew all along that the said land was under the Act 1960.

[3] The restriction on the title left no doubt that the land could not be sold using whatever means including an agreement of sale and power of attorney, which was intended to dispose off or sell the land without the prior permission of the State Authority.

[4] The plaintiff was clearly incompetent to adduce formal evidence given her infirmity. Furthermore, there is no rule in civil cases that the plaintiff or defendant must testify or be capable of testifying . The parties can rely on other witnesses to prove the facts that they are relying on.

[5] The non-production of Ong and Tay is not fatal to the plaintiff's case as the plaintiff was not relying on the sale documents to support her claim. She is the registered proprietor of the said land and under s. 340 of the National Land Code, her title is undefeasible. The plaintiff has proved her case and the defendant has failed to prove his counterclaim. As such, judgment is given to the plaintiff as prayed and the defendant's counterclaim is dismissed with costs.

[Plaintiff's claim granted. Defendant's counterclaim dismissed with costs].

Cases referred to:

Chong Khee Sang v. Pang Ah Chee [1984] 1 MLJ 377 ***(foll)***

Malaysian National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corp [1986] 2 MLJ 124 ***(foll)***

Saunders v. Anglia Building Society [1970] 3 All ER 961 ***(foll)***

Wang Leong Sing & Anor. v. Wang Tat Ann [1989] 1 CLJ 542 ***(foll)***

Legislation referred to:

Land (Group Settlement Areas) Act 1960, ss. 12(1), 12(3), 15 & 15(2)

National Land Code 1965, ss. 81, 82, 206(3) & 340

For the plaintiff - A.K. Yeong; M/s. A.K. Yeong & Co.

For the defendant - S.V.K. Singham; M/s. Singham & Co.

JUDGMENT

Rahmah bte Hussain J:

The plaintiff, a deaf mute, is the registered proprietor of land known as H.S. (M) 2153 Lot 2344 Mukim of Niyor, Kluang containing an area of 8A 1R 06P (hereinafter called the said land), since 1988 and is trying to recover possession from the defendant who is cultivating the land.

In resisting the plaintiff's claim, the defendant alleges that the plaintiff had sold the said land to one Ong Kai Beng and Tay Kim Bok *vide* a sale and purchase agreement and power of attorney sometime in 1965 and claims to have derived title from these two individuals through a series of sale and purchase agreements and power of attorney.

As a counterclaim, the defendant prays for specific performance or the market value of the said land.

In proving her case, the plaintiff called PW1 the Assistant Land Administrator for the District of Kluang, Johor in charge of Group Settlement Areas (GSA) in the district. He stated that the plaintiff is the registered proprietor of the said land and he tendered the issue document of title (IDT) which was marked as exhibit P1. According to PW1, P1 was issued to the plaintiff in 1988 and has the following restriction:

> Tanah yang dikurniakan ini tidak boleh dijual, digadai, dicagar, dipajak atau pun dipindahmilik dengan apa cara sekalipun, termasuklah dengan cara menggunakan segala surat perjanjian yang bertujuan untuk melepaskan/menjual tanah itu tanpa kebenaran Penguasa Negeri.

PW1 explained that the plaintiff was authorised to occupy the said land in expectation of title under the Land (Group Settlement Areas) Act 1960 sometime in 1963.

He also testified based on his record that the only evidence which indicated the plaintiff knew about her successful application to the said land was a notice (Borang 5A) issued under ss. 81 and 82 of the National Land Code (NLC) 1965 by the said land office signed by her on 28 May 1988 although it was issued on 30 November 1983. This notice and all other letters issued by the land office were sent to No. 30, Jalan Chendana, Taman Kurnia, Kluang, the address of the defendant.

PW2, the sister of the plaintiff, testified that the plaintiff was not aware that her application had been successful. Her land has also been sold *vide* an agreement and power of attorney to the same two (2) persons, i.e. Ong Kai Beng, her uncle and one Tay Kim Bok on the same day, i.e. 25 April 1965 before the same lawyer for the same consideration, i.e., RM600.

She affirmed that she never went to any legal firm on the said date and neither did she nor the plaintiff sign any agreements on the said date. She further elaborated that the plaintiff is a deaf mute, residing together with the family and never had any formal schooling. This fact was further confirmed by an ENT specialist report, marked as Exhibit P10.

PW2 also said that both the plaintiff and she only knew that they were successful in their applications for the land and that they had sold their lands on 25 April 1965 to Ong Kai Beng and Tay Kim Bok, in 1988 when the issue document of title to the respective pieces were issued and the purported "sub-purchasers" were not able to collect the title deeds from the land office.

The plaintiff, PW3, who was never sent to a school for the handicapped children, could not give formal evidence in Court as the interpreter from the school for the handicapped was not able to administer the formal oath.

In his evidence, the defendant (DW1), stated that his family bought the said land from one Tay Kim Bok for RM3,000 in 1970 and that his family improved the said land. He produced three (3) documents in support of his claim, namely exhibit D11, that is agreement of sale and purchase and power of attorney dated 25 April 1965 between plaintiff and Ong Kai Beng and Tay Kim Bok; exhibit D12, that is an agreement of sale and deed of substitution under power of attorney dated 18 October 1970 between Tay Kim Bok and Chin Hoy Lan; and exhibit D13, that is agreement of sale and deed of substitution under power of attorney dated 23 January 1977 between Chin Hoy Lan and Chin Whye Thiam.

The defendant also said that he was "harassed" by the husband of the plaintiff sometime in 1988 and, as a result, lodged a caveat on the said land. He admitted he was legally represented at all material times and knew the said land was under the group settlement areas scheme.

Clearly, the defendant, in this case, is relying on s. 206(3) of the National Land Code (NLC) 1965 and the proviso to s. 340 of the NLC. Now, s. 206(3) reads as follows:

> Nothing in sub-section (1) shall effect the contractual operation of any transaction relating to alienated land or any interest therein.

and s. 340 reads:

> Provided that nothing in this sub-section shall afffect any title or interest acquired by any purchaser in good faith and for valuable consideration or by any person or body claiming through or under such a purchaser.

Counsel for the plaintiff submitted that exhibits D11 (agreement of sale and purchase and power of attorney dated 25 April 1965 between plaintiff and Ong Kai Beng and Tay Kim Bok) and D12 (agreement of sale and deed of substitution under power of attorney dated 18 November 1970 between Tay Kim Bok and Chin Hoy Lan) are inadmissible on the ground that the existence, due execution and contents of the document were never admitted by the plaintiff and never proven. He said the abovementioned exhibits should have been tendered through the maker and that, in this case, the defendant is not the maker. In support of his contention, he cited the case of *Chong Khee Sang v. Pang Ah Chee* [1984] 1 MLJ 377.

He also cited the case of *Malaysian National Insurance Sdn. Bhd. v. Malaysia Rubber Development Corp.* [1986] 2 MLJ 124 where the Federal Court held that inadmissible evidence does not become admissible merely because no objection was taken earlier.

So, in the present case, since the defendant is not a party to the said documents and since by his own admission he has no knowledge at all about them, I am of the opinion that the two documents are inadmissible and cannot be relied upon by the defendant. Furthermore, the plaintiff's plea of *non est factum* applies in this case as the plaintiff is a deaf mute and an illiterate person as well. There is no evidence adduced by the defendant that the contents of the two documents were read over and explained to the plaintiff. (See *Saunders v. Anglia Building Society* [1970] 3 ALL ER 961).

Now, the plaintiff's rights and obligations in relation to the said land are governed by the provisions of the Land (Group Settlement Areas) Act 1960. Under s. 12(1) of the said Act, the plaintiff was authorised to occupy the said land by having her name entered in the register of holdings. But the occupation of the said land and the registration of her name in the register of holdings are not to be taken or deemed to have acquired any right to registration of title to such holding as any such authority may be cancelled by the Collector at any time before title has been registered. (Section 12(3) of the Act). Furthermore, the plaintiff could not sub-divide, co-own, lease, or sub-let the said land. (Section 15 of the Act).

So, in this case, since the holding was at all material times prior to 24 May 1988 (the date when the issue document of title to the said land was issued to the plaintiff) State land, the plaintiff has no land to sell to Ong Kai Beng and Tay Kim Bok for RM600. Furthermore, under s. 15(2) of the Act, no land comprised in a rural holding may be held by way of undivided shares.

Similarly, when the defendant's sister, Chin Hoy Lan, bought the said holding on 18 October 1970 from Tay Kim Bok (as alleged by the defendant), the said land was still under the name of the plaintiff in the register of holdings.

Therefore, the defendant cannot claim as a *bona fide* purchaser for value without notice as well, as he has admitted in cross-examination that he and his family knew all along that the said land was under the Land (Group Settlement Areas) Act 1960.

Lastly, when the land was alienated to the plaintiff on 28 May 1988, the restriction endorsed on the issue document of title is as follows:

> Tanah yang dikurniakan ini tidak boleh **dijual**, digadai, dicagar, dipajak atau pun dipindahmilik **dengan apa cara sekalipun, termasuk dengan cara menggunakan segala surat perjanjian yang bertujuan untuk melepaskan/menjual tanah ini tanpa kebenaran Peguasa Negeri.**

Thus, the above restriction left no doubt that the land cannot be sold using whatever means including an agreement of sale and power of attorney, which was intended to dispose off or sell the land without the prior permission of the State Authority.

In the case of *Wang Leong Sing & Anor. v. Wang Tat Ann* [1989] 1 CLJ 542 (p. 12 of PBA) where an almost similar restriction was imposed, LC Vohrah J held that such a contract was "illegal and of no effect by reason of s. 24 of the Contract Act 1950 as being of such nature that if permitted would defeat the provisions of any law and/or opposed to public policy".

As regards the submissions by learned Counsel for the defendant that the fact the plaintiff did not give evidence and subject herself to cross-examination is fatal to her case, I am of the opinion that the plaintiff is clearly incompetent to adduce formal evidence given her infirmity. As a matter of fact, she did make an attempt to give evidence but could not communicate with the interpreter from the school for the handicapped, as she did not understand the sign language. Furthermore, there is no rule of law in civil cases that the plaintiff or defendant must testify or be capable of testifying. The parties can rely on other witnesses to prove the facts that they are relying on.

On the submission that the non-production of Ong Kai Beng and Tay Kim Bok is fatal to the plaintiff's claim to my mind, this is not so as the plaintiff is not relying on Exhibit D11 to support her claim. She is the registered proprietor of the said land and, under s. 340 of the National Land Code, her title is indefeasible.

Thus for the above reasons, I am satisfied that the plaintiff has proved her case and that the defendant has failed to prove his counterclaim. As such, I give judgment to the plaintiff as prayed, and dismiss the defendant's counterclaim with costs.